

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 6, 2007 Session

FRANK A. GOOCH v. CITY OF PULASKI, ET AL.

Appeal from the Circuit Court for Giles County
No. CC-10598 Robert L. Holloway, Judge

No. M2006-00451-COA-R3-CV - Filed on March 30, 2007

Employee filed an action against the City of Pulaski, the mayor of Pulaski, and Public Works Committee members, alleging a violation of the Tennessee Public Protection Act, a violation of the Public Employee Political Freedom Act, negligence under the Government Tort Liability Act, and common law retaliation, after employee was allegedly terminated for insubordination. Defendants filed a motion for summary judgment which the court granted, dismissing all of Plaintiff's claims. Plaintiff appeals the dismissal of his claims against the City. We affirm the decision of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Phillip P. Welty and Trevor W. Howell, Nashville, Tennessee, for the appellant, Frank A. Gooch.

Teresa Reall Ricks and J. Russell Farrar, Nashville, Tennessee, for the appellee, City of Pulaski.

OPINION

I.

In 1978 the City of Pulaski hired Mr. Frank Gooch as the Assistant Superintendent for the City's Water and Sewer Department. In 1983 he was promoted to Manager Superintendent and his responsibilities included overseeing the operation of the department including the water treatment plant, water distribution system, wastewater treatment plant, and wastewater collection system. The State of Tennessee requires that the City employ an individual who holds a license in each of these four areas and that the City return an annual certification form to the State before August 1 of each year designating a licensed individual "in direct charge" of each of the four systems.

Mr. Gooch held licenses in the areas of water distribution and wastewater collection and from 1983 until August 2000, Mr. Gooch was responsible for signing the certification form and returning it to the State. In 2000, the City restructured its operations and as a result, the position of Public Works Director was created and filled by Mr. Harold Brooks. At that time, Mr. Gooch continued to oversee the operation of the water and sewer department however, he reported to Mr. Brooks. On June 15, 2001, Mr. Brooks reassigned Mr. Gooch from Manager Superintendent to Water and Sewer Inspector and Special Projects Coordinator. As a result of the reassignment, water and sewer department employees who reported to Mr. Gooch began reporting to Mr. Brooks.

On June 4, 2001, Mr. Gooch signed the annual certification form. However, sometime after June 15, 2001, but before August 1, 2001, Mr. Gooch claims that he informed Mr. Brooks that since he no longer had employee supervisory responsibility or the ability to make decisions concerning the water distribution system, his name should be removed from the certification form. Mr. Gooch asserts that despite his protests, Mr. Brooks signed and mailed the form to the State on July 10, 2001, certifying that Mr. Gooch was the individual in direct charge of the water distribution system. Mr. Gooch claims that he thereafter complained about his reassignment and the continued use of his name on the annual certification form to Alderman Mitchell Birdsong.

From November 19, 2001, until June 17, 2002, Mr. Gooch was on medical leave due to knee surgery. While absent, the water and sewer office was closed and incorporated into the Public Works office and as a result, Mr. Gooch's desk was relocated to the Public Works office. Sometime after June 17, 2002, Mr. Gooch claims that Mr. Tommy Watkins, an Alderman and Public Works Committee ("PWC") member, came to the water distribution warehouse and attempted to convince Mr. Gooch to comply with the City's existing certification procedure. Mr. Gooch allegedly refused. On July 22, 2002, Mr. Brooks signed the annual certification form and designated that Mr. Gooch was the individual in direct charge of the City's water distribution system. However, Mr. Gooch refused to sign the form.

On August 16, 2002, Mr. Brooks and his secretary were scheduled to be out of the office and therefore Mr. Gooch was expected to answer the phones. Without prior approval, Mr. Gooch did not show up at work. Mr. Brooks and the human resources director for the City met with Mr. Gooch on August 19, 2002, to discuss his absence. On August 29, 2002, Mr. Gooch was again absent from work without prior approval from Mr. Brooks. Mr. Brooks met with Mr. Gooch the following day to discuss his un-excused absence. At that time, Mr. Gooch reminded Mr. Brooks that he would not be in the office on September 4 and September 6, 2002, in order to attend a continuing education class in Murfreesboro, which Mr. Brooks had previously approved.

On September 3, 2002, Mr. Brooks contacted Mr. Gooch and told him to report to the Stream Bank Stabilization Project on September 4 and 6, instead of attending the continuing education class. Evidently, the employee in charge of the project could not be present due to surgery and Mr. Gooch was not required to attend a continuing education class for another two years without jeopardizing his certification. Mr. Gooch attempted to take a personal vacation day in order to attend the class, however, Mr. Brooks denied his request. Despite Mr. Brooks' express directive, Mr. Gooch attended

the class on September 4 and 6 in Murfreesboro instead of reporting to work. Mr. Gooch also did not report to work on September 5, 2002, due to a doctor's appointment. On September 6, 2002, Mr. Brooks sent Mr. Gooch a hand-delivered letter informing him that an administrative hearing would be conducted to consider his recent actions.

On September 16, 2002, an administrative hearing was held before Mr. Brooks, who thereafter sent Mr. Gooch a memorandum which indicated his decision to terminate Mr. Gooch for insubordination effective September 24, 2002. Mr. Gooch requested a hearing before the PWC. On September 15, 2004, Mr. Gooch and counsel presented his case before the PWC who voted unanimously to uphold Mr. Gooch's termination based on gross insubordination. The PWC found that Mr. Gooch's testimony regarding false signatures on the annual State certification form was not credible.

On September 5, 2003, Mr. Gooch filed a suit against the City, the mayor, and members of the PWC, alleging a violation of the Tennessee Public Protection Act ("TPPA"), a violation of the Public Employee Political Freedom Act ("PEPFA"), negligence under the Government Tort Liability Act ("GTLA"), and common law retaliation. Defendants filed a motion for summary judgment on September 12, 2005, which the court granted on January 24, 2006, dismissing all of Plaintiff's claims. Plaintiff appeals the dismissal of his claims against the City.

II.

According to Tennessee Rule of Civil Procedure 56.04, summary judgment is only appropriate where the parties' "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The trial court "must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn.1993). On appeal from a trial court's decision on motions for summary judgment, we review the record *de novo* with no presumption of correctness. *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 894 (Tenn.1996).

III.

Mr. Gooch first claims that the trial court erred in dismissing his TPPA claim. Pursuant to Tennessee Code Annotated section 50-1-304(a) of the TPPA, "No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." In order to establish a cause of action under the TPPA, a plaintiff must show that (1) he was an employee of defendant; (2) he refused to participate in or remain silent about an illegal activity; (3) he was discharged by defendant; and (4) there exists an exclusive causal relationship between his refusal to participate in or remain silent about an illegal activity and defendant's decision to terminate him. *Merryman v. Cent. Parking Sys., Inc.*, No. 01A01-9203-CH-00076, 1992

WL 330404, at *6 (Tenn.Ct.App. Nov. 13, 1992). See *Franklin v. Swift Transp. Co., Inc.*, 210 S.W.3d 521, 528 (Tenn.Ct.App.2006).

Plaintiff argues that he was discharged from his employment with the City because he refused to sign the annual State water certification form and because he reported what he perceived to be illegal falsification of the certification forms. After a review of the record, we agree with the trial court's dismissal of Plaintiff's TPPA claim because Plaintiff failed to present substantial, material evidence of an exclusive causal relationship between his refusal to participate in and to remain silent about allegedly illegal activities and the City's decision to terminate him. Mr. Gooch does not dispute that Mr. Brooks instructed him to report to work on September 4 and 6, nor does he allege that he did not understand that he was expected to report to work on such dates. Rather, Mr. Gooch admits that he deliberately chose not to attend the Stream Bank Stabilization Project, despite Mr. Brook's instructions, in order to participate in a continuing education class in Murfreesboro.

According to the City of Pulaski Personnel Rules and Regulations 7-009,

A department head may dismiss or demote an employee, with consent of the appropriate governing committee or board. The reasons for such dismissal or demotion may include, but shall not be limited to: misconduct, negligence, incompetency, *insubordination*, unauthorized absence, falsification of records or documents, violation of any provision of city government, it's charter, ordinances or rules, state or federal laws, or any other justified reasons.

Although there is no definition in the City's personnel rules and regulations, Webster defines "insubordination" as "the quality or state of being insubordinate: defiance of authority." Webster's Third New Int'l Dictionary 1172 (3d ed. 1964). Clearly, Plaintiff's conduct on September 4 and 6 was in defiance of his supervisor, Mr. Brooks', directive.

We find no merit in Plaintiff's argument that the City's basis for termination was pretextual. Although Plaintiff claims that his conduct in September 4 and 6 was not insubordinate, he does not deny that he consciously and purposefully disregarded Mr. Brooks' instruction to attend the Stream Bank Stabilization Project. Because the City established a factually supported non-retaliatory basis for Plaintiff's termination, there is not an exclusive causal relationship between Plaintiff's refusal to participate in or to remain silent about an illegal activity and the City's decision to terminate him.

Plaintiff alternatively argues that in order for an employee to be insubordinate, the supervisor's directive must be reasonable in light of the employee's job duties. According to Plaintiff, whether a supervisor's directive is reasonable is a question of fact to be determined by the finder of fact. We likewise find no merit in this argument because there is no material question of fact as to whether Mr. Brooks' instruction to oversee the Stream Bank Stabilization Project was reasonable. It is undisputed that Plaintiff was not required to attend a continuing education class for another two years without jeopardizing his certification and the City employee in charge of overseeing the project was unavailable due to surgery. Even taking the strongest legitimate view of the evidence

in favor of Plaintiff, Mr. Brooks' instruction to attend a project conducted by the Public Works Department, the entity through which Plaintiff was employed, cannot be considered an unreasonable directive. Mr. Brooks explained the importance of Mr. Gooch's presence at the project in his affidavit, where he stated:

11. The Stream Bank Stabilization Project was scheduled to begin on September 3, 2002. I did not know the project would begin on September 3 when I approved Mr. Gooch's attendance of continuing education classes. After approving Mr. Gooch's attendance of the classes, I assigned him to oversee and maintain information for the project. The Stream Bank Stabilization Project was approved by the federal government so that a large percentage of the funds expended by the City would be recoverable from the federal government. Therefore, I believed keeping records pertaining to man hours spent by City employees and independent contractors, equipment hours, and the amount of materials used was very important. I assigned Mr. Gooch to be present at the project every day to keep records on behalf of the City for reimbursement purposes. I also believed it would be helpful to have Mr. Gooch present at the project because of his knowledge of the location of the City's water and sewer lines.

Because we agree that Plaintiff's conduct on September 4 and 6 was insubordinate and because it was reasonable for Mr. Brooks to direct Plaintiff to attend the Stream Bank Stabilization Project, we find that the trial court properly dismissed Plaintiff's TPPA claim.

IV.

Plaintiff next challenges the trial court's dismissal of his PEPFA claim. Pursuant to Tennessee Code Annotated section 8-50-603 of the PEPFA,

(a) It is unlawful for any public employer to discipline, threaten to discipline or otherwise discriminate against an employee because such employee exercised that employee's right to communicate with an elected public official.

(b) If the court of competent jurisdiction determines that a public employer has disciplined, threatened to discipline or otherwise discriminated against an employee because such employee exercised the rights provided by this part, such employee shall be entitled to treble damages plus reasonable attorney fees.

In interpreting this statute, the court has noted that "[o]bviously, the word 'because' in T.C.A. § 8-50-603(b) requires that the discriminatory actions of the public employer must have resulted from the public employee's communication with an elected official." *Pewitt v. Buford*, No. 01A01-9501-CV-00025, 1995 WL 614327, at *5 (Tenn.Ct.App. Oct. 20, 1995). However, it is unclear whether the statute requires a plaintiff to establish an exclusive causal connection between the communication and

the discriminatory action, such as required under the TPPA, or something less, such as that the communication was a substantial or motivating factor in the discriminatory action. Although we were unable to find a Tennessee state case which articulated such a standard, we located two federal cases which the addressed the question.

In *Loveday v. Sevier County Election Comm.*, No. 3:98-CV-774, 2000 U.S. Dist. LEXIS 4017, at *1 (E.D.Tenn. Mar. 20, 2000), plaintiff filed a complaint against defendants for retaliatory discharge. Defendants moved the court to certify the question whether the PEPFA required plaintiff to show that the alleged communication with an elected public official was the sole factor for plaintiff's discipline. *Loveday*, 2000 U.S. Dist. LEXIS 4017, at *1. Finding the issue neither novel nor intricate, the court concluded that if the Tennessee Supreme Court was presented with the question, it would find that plaintiff need only prove that the protected activity was a substantial factor in the employer's decision to terminate plaintiff's employment. *Loveday*, 2000 U.S. Dist. LEXIS 4017, at *12.

In *Guthoerl v. City of Mount Juliet, Tenn.*, No. 3:05-0131, 2006 WL 1454736, at *4 (M.D.Tenn. May 22, 2006), plaintiff filed a complaint against defendant for various claims arising under his employment including retaliatory discharge in violation of the PEPFA. In evaluating whether to dismiss plaintiff's PEPFA claim for failure to show causation between the alleged communication with a public official and plaintiff's actual termination, the court held that "[a]t the very least, the plaintiff must offer 'some' evidence that his termination was caused by his conversation with [an elected official]." *Guthoerl*, 2006 WL 1454736, at *8.

In both cases, the district court relied on the standards used in other employment-related causes of action in Tennessee. We also find this analysis instructive. We first note that the language of the PEPFA is similar to provisions of the Tennessee Human Rights Act ("THRA"), which state:

It is a discriminatory practice for a person or two (2) or more persons to:

(1) Retaliate or discriminate in any manner against a person because such a person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation proceeding, or hearing under this chapter.

(a) It is a discriminatory practice for an employer to:

(1) Fail to hire or discharge any person or to discriminate against any individual who has put a complaint, or has opposed employment because of such individual's race, creed, color, religion, sex, age or national origin.

Tenn.Code Ann. §§ 4-21-301, 401.

It is well established in Tennessee that a plaintiff relying on these statutes under the THRA need only show that participation in the protected activity was a motivating factor in the employer's discriminatory conduct. *Bruce v. W. Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn.Ct.App.1984). Likewise, the United States Supreme Court has held that "federal statutes concerning employment matters which are silent as to plaintiff's burden of proof require that participation in the protected activity need only be a motivating factor in the treatment of the plaintiff." *Loveday*, 2000 U.S. Dist. LEXIS 4017, at *9 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981)).

In retaliatory discharge cases brought under the Tennessee common law, the Tennessee Supreme Court has specifically rejected the sole or exclusive relationship requirement and instead held that a plaintiff has the burden of showing that the prohibited activity was a substantial factor in the employer's decision to terminate the plaintiff. *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 558-59 (Tenn.1993). Similarly, the United States Supreme Court adopted the substantial or motivating factor burden in cases concerning termination based on a First Amendment violation. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285, 97 S.Ct. 568, 50 L.Ed.2d 471,(U.S.1977).

Having reviewed the standards used in other employment-related causes of action in Tennessee as well as the standards used under the federal law, we agree that since the structure of the PEPFA is virtually identical to the structure of the THRA, the legislature intended that plaintiff bear the burden under Tennessee Code Annotated section 8-50-603 to show that the communication with an elected public official was a substantial or motivating factor in the discriminatory action taken by the employer. However, we find that in this case, Plaintiff has failed to offer substantial material evidence to support his claim.

Plaintiff proffered no evidence that either Alderman Birdsong or Alderman Mitchell informed Mr. Brooks that Plaintiff had indicated that Mr. Brooks was allegedly falsifying water certification forms to the State. Nor did Mr. Brooks testify that he had knowledge of Plaintiff's communication with Alderman Birdsong or Alderman Mitchell. Rather Mr. Brooks stated in his affidavit:

15. The decision made on September 16, 2002 regarding the termination of Frank Gooch was made by me. The members of the Public Works Committee and/or the Board of Mayor and Alderman did not advise me to take any particular action and they did not affect the decision. I made the decision after the hearing on September 16, 2002 because I believe that Frank Gooch was grossly insubordinate, that he showed

no remorse for his actions, and that he had no desire to be a productive employee of the City of Pulaski.

Likewise, Plaintiff testified in his deposition that he never told Mr. Brooks about his conversations with Alderman Birdsong and Alderman Mitchell.

Q. Okay. Did you ever tell Mr. Brooks you were going to go to the Board of Mayor and Alderman –

A. No, ma'am.

Q. – and tell them – I'm sorry, Mr. Gooch, just let me finish my question. Did you ever tell Mr. Brooks that you were going to go to the Board of Mayor and Alderman and inform them that you were using his name improperly?

A. No.

Q. All right. And the only people that you complained to were Harold Brooks, Tommy Watkins and Mr. Mitchell Birdsong?

A. That's correct.

Because Plaintiff offered no proof that Mr. Brooks had knowledge of Plaintiff's conversations with Alderman Birdsong and Alderman Mitchell, we cannot find that Plaintiff's termination was in any way related to his communication with elected public officials. We therefore find no error in the trial court's dismissal of Plaintiff's PEPFA claim.

V.

Plaintiff next contends that the trial court erred in dismissing his negligence claim under the GTLA. "In 1973, the General Assembly enacted the Tennessee Governmental Tort Liability Act (GTLA) to codify the general common law rule that 'all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities.'" *Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 79 (Tenn.2001) (quoting Tenn.Code Ann. § 29-20-201(a)). However, the general common law rule is subject to statutory exceptions. Pursuant to Tennessee Code Annotated section 29-20-205, "[i]mmunity from suit of all government entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment," subject to certain enumerated exceptions. Plaintiff argues that the City was negligent in hiring Mr. Brooks as the Public Works Director for the City of Pulaski because of his alleged incompetence and as a result of the negligent hiring of Mr. Brooks, Plaintiff was terminated. Since we have already found that Plaintiff's termination was a result of his gross insubordination and Mr. Brooks' assignment of Plaintiff to the Stream Bank Stabilization Project was reasonable in light of

Plaintiff's employment duties, we affirm the trial court's dismissal of Plaintiff's negligence claim under the GTLA.

VI.

Plaintiff finally challenges the trial court's dismissal of his common law retaliatory discharge claim. The elements required to prove a common law retaliatory discharge claim are similar to the elements required to prove a retaliatory discharge claim under the TPPA; a plaintiff must show (1) that an employment-at-will relationship existed; (2) that plaintiff was discharged; (3) that the reason for the discharge was that plaintiff attempted to exercise a statutory or constitutional right, or for any reason which violates a clear public policy evidenced by an unambiguous constitutional, statutory, or regulatory provision; and (4) that a substantial factor in the employer's decision to discharge plaintiff was plaintiff's exercise of protected rights or compliance with clear public policy. *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852, 862 (Tenn.2002). Proof of discharge without evidence of a causal relationship between the exercise of a protected right and the discharge does not present an issue for the jury. *Anderson*, 857 S.W.2d at 558-59. However, proof of a causal link between the exercise of a protected right and the employee's termination imposes upon the employer the burden of showing a legitimate, non-pretextual reason for the employee's discharge. *Anderson*, 857 S.W.2d at 559. Even assuming that a substantial factor in the City's decision to discharge Plaintiff was Plaintiff's refusal to sign the certification form and his decision to report what he perceived to be illegal falsification of the certification forms to City officials, the City has shown a legitimate, non-pretextual basis for Plaintiff's discharge and thus Plaintiff's claim must fail.

In the final analysis, this case involves a veteran employee of the City of Pulaski with a clean record who found himself displaced in a departmental reorganization that made him subordinate to a supervisor that he did not think was competent. The record before this Court consists of 1,479 pages of technical record, together with a complete transcript of a hearing before the City of Pulaski PWC. Certain pertinent findings of undisputed facts made by the trial judge are not only undisputed, but indeed indisputable. The trial court found:

7. On August 29, 2002, Gooch again missed worked. (sic) On August 30, 2002, Gooch was scheduled to meet again with Harrison and Brooks but refused to meet with Harrison present. Brooks again discussed with him absenteeism, insubordination, attitude and failure to complete work assignments.

8. On September 3, 2002, Brooks learned that Bobby Joe Townsend, an employee of the Public Works Department who had been supervising a project known as the Stream Bank Stabilization Project, would undergo hernia surgery on September 6 and would be unable to supervise the project. Brooks decided to assign Gooch to the project.

9. Gooch had been pre-approved to attend a licensing seminar in Murfreesboro, Tennessee, on September 4 and September 6. Gooch advised Brooks of the conflict.

10. Brooks checked with the State of Tennessee to see if it was necessary for Gooch to attend the seminar. He was informed that Gooch's license was good for two additional years and that other dates were available to attend the seminar at various locations, including Murfreesboro, Nashville, and Jackson.

11. Brooks instructed Gooch not to go to the seminar, but instead to report to the Stream Bank Stabilization Project as a supervisor.

12. Gooch failed to report on September 4, 2002. Gooch in fact went to the seminar rather than reporting to the Stream Bank Stabilization Project.

13. Brooks (sic) failed to appear at work on September 5, 2002. His wife called and said he had a doctor's appointment.

14. Brooks called Gooch and told him specifically not to go to the September 6, 2002 seminar, but rather report to the Stream Bank Stabilization Project. Gooch told him that he would take a vacation day. Brooks said he would not approve a vacation day and that he would receive further disciplinary action if he failed to report to the project.

15. On September 6, 2002, Gooch again failed to report to the project but instead attended the seminar.

16. By letter dated September 16, 2002, Gooch was terminated effective September 24, 2002.

In his testimony before the PWC, Gooch testified:

Q. And you were approved to go [to] this seminar?

A. I was.

...

Q. And when Bobby Joe Townsend, who had to have emergency surgery on September the 6th, who was head of the stream bank stabilization, needed you to fill in that slack, you in effect told the city, no, I'm not going to do it?

A. Mr. Townsend and I saw each other every day, and Mr. Townsend did not say one word to me about needing me. Mr. Chad Whitt was out there every day, and he was the gentleman that was in charge of the project, and he was the gentleman that was in charge of the employees.

Q. Mr. Brooks was your supervisor, though, not Mr. Townsend, wasn't he?

A. Yes.

Q. Your supervisor said, Mr. Gooch, I need you to be at work on Friday because Bobby Joe Townsend is having surgery and I want someone with your knowledge and expertise out at this project?

A. No, sir. He did not say, I want someone with your knowledge and expertise, because I do not work in storm drains. I work in water and sewer, so why would I have expertise.

Q. So, you never knew that Mr. Townsend was having surgery and Mr. Brooks wanted you to --

A. No, sir. Mr. Townsend never said a word to me.

Q. I'm asking about Mr. Brooks. You didn't know that Mr. Brooks wanted you to be at work on Friday, September 6th?

A. Yes. Mr. Brooks told me and I explained to him that I was -- that I needed to go to that, and I told him that I would even take a vacation day.

Q. But he was your boss?

A. And he said --

Q. He told you to do a job and you said, no, I'm not going to do it.

A. He said, no, you can't have a vacation day.

Q. And under the policy your supervisor has to approve vacation time, doesn't he?

A. He had already approved me being off.

Q. He had. But he came in and said, things have changed, I've got to take away that vacation approval, which under the policy he can do?

A. No, sir. He did not say that I have to take away that. He did not say anything except, I want you to be there.

Q. And you didn't show up?

A. No, sir.

Q. And you told this committee a moment ago you never committed an act of insubordination. What is insubordination, Mr. Gooch?

A. When someone tells you that you can be off and documents it and puts it on the calendar on the wall and has already okayed it, the, in my opinion, that is not insubordination.

Q. You're saying he couldn't change that?

A. He shouldn't have because he --

Q. You're saying he couldn't?

A. He had no reason to.

Q. But are you saying under the policy of the City of Pulaski he could not change that once he wrote on a calendar that you were going on a vacation day?

A. I'm saying he shouldn't have.

We are aware of no authority which allows a subordinate employee to disregard an order from his supervisor because in the subjective opinion of the subordinate such an order "shouldn't" have been given.

Pertinent findings of fact made by the PWC following the hearing before that Committee are essentially undisputed.

Frank Gooch informed Harold Brooks that he would be absent from work on September 4, 2002 and September 6, 2002 because he was scheduled to attend educational classes in Murfreesboro. Frank Gooch's attendance at the classes had been approved by Harold Brooks several weeks earlier.

On September 3, 2002, Harold Brooks was informed that Bobby Joe Townsend was required to undergo surgery on September 6, 2002. Upon realization by Harold Brooks that Mr. Townsend, who had been supervising the Stream Bank Stabilization Project, was to have surgery, Frank Gooch was instructed to be present at the project. Harold Brooks and Terry Harrison contacted Brent Ogle with the State of Tennessee in order to determine whether Frank Gooch was required to attend classes on September 4, 2002 and September 6, 2002 to maintain state licensure requirements. Mr. Ogle informed Harold Brooks and Terry Harrison that attendance of the classes was only necessary every three (3) years and that Frank Gooch's licenses were valid until 2004. Mr. Ogle faxed a class schedule to Harold Brooks which indicated several available classes within the following months. As a result, on September 3, 2002, Harold Brooks informed Frank Gooch that instead of attending the classes in Murfreesboro he should report to work at the Stream Bank Stabilization Project. However, Frank Gooch told Harold Brooks that he was going to attend the classes in Murfreesboro, and Frank Gooch failed to report to work on September 4, 2002. Harold Brooks and Terry Harrison contacted Brent Ogle and determined that Frank Gooch did attend classes in Murfreesboro on September 4, 2002.

On September 5, 2002, Frank Gooch failed to appear for work because he had a doctor's appointment. Frank Gooch had his wife contact Harold Brooks by telephone at 8:00 a.m. on September 5, 2002 and inform Harold Brooks of the scheduled doctor's appointment. In addition, Frank Gooch had his wife deliver a note to Harold Brooks stating that he would not appear for work on September 6, 2002 because he was attending classes in Murfreesboro. The note further stated that Frank Gooch was using a vacation day to attend the classes. When Harold Brooks received the note, he contacted Frank Gooch by telephone and informed him that he was

needed at the Stream Bank Stabilization Project because Bobby Joe Townsend was not available as he was scheduled for surgery. Harold Brooks told Frank Gooch to report to work and that a vacation day for attendance of classes in Murfreesboro would not be approved. Frank Gooch stated that he was going to the classes anyway. Harold Brooks then informed Frank Gooch that if he failed to report to work on September 6, 2002, disciplinary action would be taken against him.

On September 6, 2002, Frank Gooch failed to report to work and attended classes in Murfreesboro. As a result, Harold Brooks had a City of Pulaski police officer deliver a letter to Frank Gooch informing him that an administrative hearing to consider his recent actions would be conducted on September 16, 2002.

...

This Committee finds that the actions of Frank Gooch in failing to report for work with the City of Pulaski on September 4, 2002 and September 6, 2002 constitute gross insubordination. Therefore, this Committee finds that Harold Brooks had legitimate reasons for terminating Frank Gooch's employment with the City of Pulaski.

Finally, in the trial court order granting summary judgment, that court held:

22. Gooch's actions on September 4 and September 6, 2002, were in direct disregard of a directive from his supervisor. His conduct amounted to gross insubordination which led directly to his termination by Brooks. That termination became preliminary or conditional upon Gooch's appeal to the Public Works Committee. The Public Works Committee, after an extensive hearing, unanimously terminated Gooch for this insubordination.

23. Assuming for the purpose of summary judgment that Brooks was angry toward Gooch because he complained about his name being used on the state reporting form, and assuming his anger was a factor in assigning Gooch to the Stream Bank Stabilization Project, (a quantum leap under the facts presented), those facts do not overcome the fact that Gooch directly disregarded his duties and was openly insubordinate. Even in a light most favorable to the Plaintiff, the alleged reporting of a violation of state law by Gooch was not the sole ground for termination of Gooch by Brooks or by the Public Works Committee.

24. The Public Works Committee terminated Gooch for gross insubordination. The conversations Gooch had with elected officials, the details and substance of which are disputed, were not a factor in the Public Works Committee's decision to terminate Gooch.

25. There is no proof that the assignment given to Gooch by Brooks on September 4 and 6 was retaliatory. To the contrary, the proof was that the assignment was necessary for regulatory or contractual compliance. Whether Brooks was competent or not to oversee the Public Works Department is not the issue. Brooks assigned Gooch an important task and Gooch directly and intentionally challenged the authority of his boss. That type of insubordination gets you fired whether your boss is competent or not. There is no genuine issue of material fact as to whether Brooks was qualified and empowered to assign Gooch to the Stream Bank Stabilization Project. Brooks' action in assigning Gooch to the project is the only pertinent issue related to his competency to act as director of the Public Works Department relevant to this case. The Defendants are entitled to summary judgment as a matter of law on the claim alleging negligent hiring under the Government Tort Liability Act or common law negligence.

In contrast to these extensive and undisputed findings of fact as to gross insubordination by both the PWC and the trial judge, Appellant counters with no substantial material evidence, relying instead on his own subjective perceptions. After being relegated to a subordinate position following more than 20 years of apparently competent service, the disappointment of Mr. Gooch is understandable. However, he is the author of his own misfortune.

Having found no merit in Plaintiff's contentions on appeal, the judgment of the trial court is affirmed in all respects and the costs of appeal are assessed against Appellant, Mr. Gooch.

WILLIAM B. CAIN, JUDGE